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## Decision

**Matter of:** Complete Packaging and Shipping Supplies, Inc.

**File:** B-412392, B-412392.2, B-412392.3

**Date:** February 1, 2016

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### DIGEST

1. Protest challenging agency’s evaluation of sample products is denied where the evaluation was reasonable, adequately-documented, and consistent with the solicitation.

2. Protest challenging agency’s decision to waive solicitation requirements is denied where the agency’s actions did not reflect unequal treatment and the protester has not demonstrated that it was prejudiced by the waiver.

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### DECISION

Complete Packaging and Shipping Supplies, Inc. (CPSS), a small business of Freeport, New York, protests the Department of Veterans Affairs (VA) establishment of a blanket purchase agreement (BPA) with M-Pak, Inc., a small business of Aledo, Texas, pursuant to request for quotations (RFQ) No. VA770-15-Q-0046, issued for operational supplies for the VA’s consolidated mail outpatient pharmacy (CMOP) in Charleston, South Carolina. CPSS challenges the evaluation of its technical quotation and objects to the VA’s decision to remove two items from its requirements.

We deny the protest.

## BACKGROUND

The RFQ, issued on July 2, 2015, as a small business set-aside, sought quotations from General Services Administration (GSA) Federal Supply Schedule (FSS) contract holders pursuant to the simplified procedures of Federal Acquisition Regulation (FAR) subpart 8.4. RFQ at 1. The purpose of the RFQ was to establish a single BPA with a 1-year base period and four 1-year option periods for “durable, secure, quality products” for the CMOP to prepare and mail prescription medication to veterans. Id. at 3, 8. Specifically, the RFQ identified 25 items for inclusion on the BPA, such as different size bubble mailers, poly mailers, boxes, coolers, tape, and bags.<sup>1</sup> Id. at 9-10. The RFQ contemplated that the BPA would be established on a best-value basis, considering technical conformance, past performance, contingency plan, veterans’ involvement, and price. Id. at 25.

The RFQ provided specifications for each product. Id. at 9-10. In addition, with respect to technical conformance, the solicitation identified various characteristics of each product type that the agency would evaluate. Id. at 26-29. As an example, for the bubble mailers, the agency would assess whether the mailers were the correct dimensions, had an anti-static strip, had strong glue (such that once sealed, a bag had to be cut or torn to open), and had a “[s]uper tough plastic inner layer,” among other things. Id. at 27. For purposes of determining technical conformance, the RFQ required the submission of 10-15 samples of six of the 25 products: four sizes of bubble mailers and two sizes of poly mailers.<sup>2</sup> Id. at 8. The RFQ advised that to be considered for award, a vendor’s quotation must be rated as good under the technical conformance factor. Id. at 26.

CPSS, M-Pak, and a third vendor submitted quotations prior to the RFQ’s July 28 deadline. Contracting Officer’s (CO) Statement at 1. A VA technical evaluation board (TEB) evaluated the vendors’ samples and documented its findings on consensus evaluation rating sheets. With respect to CPSS’s bubble mailer samples, the TEB rated one of the sizes as excellent, two sizes as good, and one size as fair.<sup>3</sup> Agency Report (AR), exh. 10, Consensus Technical Evaluation of CPSS, at 2; see also AR, exh. 15, TEB Handbook, at 5-6 (defining technical ratings). In assigning the fair rating, the TEB highlighted that the “glue (paper strip) was removed/unattached” on the samples and “it tore from each side very easily.”

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<sup>1</sup> The RFQ initially included a 26th item, document paper, but the paper subsequently was removed via a solicitation amendment. See RFQ amend. 2, at 1.

<sup>2</sup> For the remaining items where samples were not requested, the VA reviewed the GSA contract item description of the quoted product to determine conformance. Contracting Officer’s Statement at 2.

<sup>3</sup> The TEB assigned the samples ratings of poor, fair, good, and excellent. AR, exh. 15, TEB Handbook, at 5-6.

AR, exh. 10, Consensus Technical Evaluation of CPSS, at 2. With respect to CPSS's poly mailer samples, the TEB rated one size as poor and the other as fair. Id. at 3. In assigning these ratings, the TEB noted as follows: "Both samples were stuck together upon removal from it's [sic] shipping package. They both tore and punctured very easily. Both samples were . . . not anti-static." Id. The TEB assigned CPSS's samples an overall fair rating. Id. at 1. Given the fair rating assigned to the samples, the agency no longer considered CPSS eligible for award.<sup>4</sup> CO Statement at 2; see RFQ at 26.

With respect to M-Pak's samples, the TEB rated two of the vendor's items as good and four of the items as excellent. AR, exh. 21, Consensus Technical Evaluation of M-Pak, at 1-3. For the remaining products, M-Pak provided the contracting specialist a list of the FSS item numbers so that the VA could verify that the products met the solicitation's specifications. CO Statement at 3. In addition, M-Pak advised the VA that three items the vendor quoted--gum tape, utility knife, and replacement blades--were in the process of being added to M-Pak's FSS contract. Id. The third vendor failed to submit all required samples and, consequently, was removed from award consideration. AR, exh. 23, Consensus Technical Evaluation of Vendor #3, at 1-2; see RFQ at 3, 8 (warning that quotations without product samples would be considered unacceptable).

The contracting officer prepared a source selection decision document (SSDD) that identified M-Pak's \$13,861,525 quotation--the only one rated good under the technical conformance factor--as the best value to the agency.<sup>5</sup> AR, exh. 17, SSDD, at 5. However, the record reflects that the day after the contracting officer signed the SSDD, M-Pak still had not been able to add the utility knife and replacement blades to its FSS contract.<sup>6</sup> CO Statement at 3; see AR, exh. 12,

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<sup>4</sup> The agency previously had requested from CPSS a list of the FSS item numbers for each product quoted so that the agency could verify that the item description met the RFQ's specifications. CO Statement at 3. CPSS responded to the VA's request, but the agency did not conduct any verification of the items because the samples were rated fair. Id.

<sup>5</sup> CPSS's evaluated price was \$14,040,664. AR, exh. 17, SSDD, at 5. CPSS and M-Pak both were rated very relevant/very good under the past performance factor and excellent and fair, respectively, under the contingency plan factor. Id. at 2-3. Neither vendor qualified for any credit under the veterans' involvement factor. Id. at 4.

<sup>6</sup> M-Pak explained to the contracting specialist that while the vendor had quoted the utility knife and replacement blades that the VA had been receiving under the previous contract, the items were actually made in China and not compliant with the Trade Agreements Act (TAA); thus, the items could not be added to the vendor's FSS contract. AR, exh. 12, Email Exchanges with M-Pak Regarding Knife, at 1; CO  
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Email Exchanges with M-Pak Regarding Knife, at 1. So that the VA “could move forward with award,” the agency removed the knife and blades from its requirements.<sup>7</sup> CO Statement at 4.

The VA established the BPA with M-Pak on October 15.<sup>8</sup> After receiving a brief explanation of award, CPSS protested to our Office.

## DISCUSSION

CPSS protests the VA’s evaluation of its quotation under the technical conformance factor. Specifically, CPSS argues that the evaluation of its samples was unreasonable, contrary to the solicitation, and reflected unequal treatment. In addition, the protester objects to the agency’s decision to remove the knife and replacement blades from its requirements, and contends that doing so resulted in unequal treatment. We have fully considered each of CPSS’s allegations and find that none provides a basis to sustain the protest. We discuss CPSS’s primary complaints below.

Where an agency conducts a formal competition for the establishment of a BPA, we will review the agency’s actions to ensure that the evaluation was reasonable and consistent with the solicitation and applicable procurement statutes and regulations. InTec, LLC, B-408178.4, Feb. 12, 2014, 2014 CPD ¶ 109 at 3. An agency’s evaluation of technical quotations is primarily the responsibility of the contracting agency, since the agency is responsible for defining its needs and identifying the best method of accommodating them. SSI Tech., Inc., B-411585, Aug. 26, 2015, 2015 CPD ¶ 275 at 3. In reviewing an agency’s evaluation, we will not reevaluate vendors’ quotations, and a protester’s disagreement with the agency’s evaluation, without more, is not sufficient to render the evaluation reasonable. Advanced Tech. Sys., Inc., B-296493.5, Sept. 26, 2006, 2006 CPD ¶ 147 at 5.

Here, we find unobjectionable the VA’s evaluation of CPSS’s quotation under the technical conformance factor. As discussed above, the RFQ required the submission of 10-15 samples of six different products (four sizes of bubble mailers

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Statement at 3. (The TAA generally requires that end products be acquired from the U.S. or designated countries, and applies to FSS contracts. See 19 U.S.C. § 2512(a); ARKRAY USA, Inc., B-408981.4, Mar. 5, 2014, 2014 CPD ¶ 90 at 4 n.6.)

<sup>7</sup> The VA previously had removed another item from its requirements--fill-air inflatable packaging film--because the item had been discontinued and was no longer needed. CO Statement at 4.

<sup>8</sup> As a result of removing the knife and replacement blades, the BPA was established with M-Pak for \$13,815,731. AR, exh. 7, BPA, at 23.

and two sizes of poly mailers). RFQ at 8. In response, CPSS provided the VA with significantly more samples than requested: four cartons of bubble mailers (1,320 samples) and two cartons of poly mailers (2,000 samples). Protest at 5. The VA explains that the TEB did not review the thousands of samples; instead, as it did for all vendors, the evaluators assessed 10-15 samples pulled “right from the top of the box.”<sup>9</sup> AR, exh. 6, Statement of TEB Member, at 1. In conducting their evaluation, the TEB members visually examined each sample to verify that it met the RFQ’s specifications, and the members manually tested the items for durability, i.e., “tearing and puncturing, and functionality.” Supp. CO Statement at 1. The TEB documented its consensus findings on technical evaluation rating sheets.<sup>10</sup>

As noted above, with respect to CPSS’s 12.5 inch by 19 inch bubble mailers, the evaluators documented two concerns. First, the TEB highlighted that the glue (paper strip) was not attached to the samples. AR, exh. 10, Consensus Technical Evaluation of CPSS, at 2. The evaluators report that they checked several samples to “validate this adhesive discrepancy.” AR, exh. 19, Supp. Statement of TEB Member, at 1. The evaluators also noted that the samples tore “very easily” from each side.<sup>11</sup> AR, exh. 10, Consensus Technical Evaluation of CPSS, at 2; Supp. CO Statement at 1.

With respect to both size poly mailers, the evaluators expressed concern that the samples “stuck together” when they were removed from the shipping package, “almost as if they became overheated or exposed to excess humidity.” AR, exh. 10,

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<sup>9</sup> To the extent that the protester complains that the VA should have reviewed more samples than it did, such assertion is without merit. See Protest at 13, 16. In this respect, the RFQ required the submission of only 10-15 samples. RFQ at 8. That the vendor chose to submit significantly more samples than requested imparted no obligation on the agency to assess any samples beyond those required by the solicitation.

<sup>10</sup> Notwithstanding the protester’s assertion otherwise, we find that the documentation in the record satisfies the minimum documentation requirements for establishing a BPA, see FAR § 8.405-3(a)(7), and provides sufficient detail to show that the agency’s evaluation was reasonable. See Comments/Supp. Protest at 32-35. Specifically, the TEB memorialized its findings on consensus rating sheets that included both numerical and narrative assessments of the samples. See, e.g., AR, exh. 10, Consensus Technical Evaluation of CPSS, at 1-3. Moreover, the agency was not required to document every instance where the evaluators concluded that a vendor met the RFQ’s requirements. See Harris Patriot Healthcare Solutions, LLC, B-408737, Nov. 21, 2013, 2014 CPD ¶ 5 at 4.

<sup>11</sup> The TEB evaluated CPSS’s other bubble mailers favorably, noting in particular that those mailers “were not easily torn from any side.” AR, exh. 10, Consensus Technical Evaluation of CPSS, at 2.

Consensus Technical Evaluation of CPSS, at 3; exh. 19, Supp. Statement of TEB Member, at 1. The TEB also documented that the poly mailers “tore and punctured very easily” and were not anti-static, something noted when static from the samples cause the poly mailers to cling to the evaluators’ clothing. AR, exh. 10, Consensus Technical Evaluation of CPSS, at 3; Supp. CO Statement at 2. Because problems were identified with three of the six products that CPSS submitted samples of, the quotation was rated as fair overall under the technical conformance factor.

Given the evaluators’ documented findings, we have no basis to question the rating assigned to CPSS’s quotation. In this regard, the record does not support the protester’s position that the issues identified were “minor,” see Protest at 12, or that the fair rating was unwarranted because the problems covered only a few of the RFQ’s specifications for each mailer. See Comments/2nd Supp. Protest at 22. For instance, with respect to the unattached paper strip for the glue on the bubble mailer, the agency explains that without the protection of the paper strip “the glue would not retain the ability to provide an instant seal or remain strong enough that once sealed a bag must be cut or torn to open,” as required by the specifications. CO Statement at 2; see RFQ at 27. For the poly mailers, the fact that the mailers were stuck together raised a concern that the mailers would stick together during post office automated processing, something the RFQ’s specifications specifically warned against. CO Statement at 2; see RFQ at 27. The agency maintains that CPSS’s samples “raised concern about their integrity, durability, and ease of use . . . . Issues with durability and usefulness of a mailer bag is not a minor issue for us.” CO Statement at 5. While CPSS may disagree with the significance of the agency’s concerns, such disagreement does not provide a basis to sustain the protest.

The protester also takes exception to the TEB’s specific conclusion that the vendor’s samples tore easily, arguing that such a finding does not expressly relate to the RFQ’s specifications and questioning what the evaluators meant by tearing “easily.” Comments/2nd Supp. Protest at 22, 27. CPSS’s arguments are wholly unpersuasive. In this respect, in evaluating quotations an agency properly may take into account specific, albeit not expressly identified, matters that are logically encompassed by, or related to, the stated evaluation criteria. Open Sys. Science of Virginia, Inc., B-410572, B-410572.2, Jan. 14, 2015, 2015 CPD ¶ 37 at 11. In our view, how easily a mailer can break open was logically encompassed by the RFQ’s requirements that the bubble mailers have a “[s]uper tough” inner layer and a “thick” polyolefin film and that the poly mailers be “[d]urable” and “thick.” See RFQ at 27. Indeed, the RFQ sought the provision of “durable, secure, quality products . . . [that] will need to function properly.” Id. at 8. As the agency points out, a mailer that rips or punctures easily may not be able to “withstand rough handling in transit,” i.e.,

function properly. See Supp. CO Statement at 1, 2. We see nothing objectionable about this concern.<sup>12</sup>

We also decline to sustain the protest on the basis that the TEB did not define their conception of what tearing easily meant. The record reflects that the TEB reviewed and evaluated the vendors' samples consistently and in accord with the solicitation's evaluation criteria. The TEB reached the consensus conclusion that, based on their subjective judgment, the mailers tore easily. Technical evaluators have considerable latitude in assigning ratings which reflect their subjective judgments of a quotation's relative merits. See Digital Sys. Group, Inc., B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50 at 6. That the protester is uncertain what "easily" means here and would have preferred different, objective testing standards does not establish that the TEB's findings were unreasonable or inconsistent with the solicitation.

Equally unavailing is the protester's argument that the evaluation was flawed because the vendor offered the same mailers that the agency currently uses.<sup>13</sup> See Protest at 15, 16; Comments/2nd Supp. Protest at 23, 28. We have previously held that each procurement "stands on its own." E.g., Camnetics Mfg. Corp., B-299738, June 21, 2007, 2007 CPD ¶ 115 at 3. Thus, even if the mailers CPSS submitted were the same as those accepted by the CMOP under a different contract, that does not render unreasonable the agency's well-explained determination that the protester's samples warranted a fair rating. See Custom Pak, Inc.; M-Pak, Inc., B-409308 et al., Mar. 4, 2014, 2014 CPD ¶ 73 at 5-6 (finding reasonable the VA's determination that protesters' pharmaceutical mailing bags failed testing even though the bags were identical to bags supplied in previous VA acquisitions). Indeed, the agency explains that the samples were evaluated after they were subject to the vendors' storage and handling procedures, which could impact the samples. AR at 8. Consequently, we find no merit to this contention.

Finally, CPSS complains that it was improper for the VA to limit its evaluation to CPSS's samples and not assess the remainder of the products CPSS quoted. Supp. Protest at 3-4. Here, CPSS has not established that it was competitively

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<sup>12</sup> The protester also contends that the record evinces disparate treatment because one of M-Pak's samples "tore easy," but the quotation was rated good nonetheless. Comments/2nd Supp. Protest at 24; AR, exh. 21, Consensus Technical Evaluation of M-Pak, at 2. This argument ignores the other multiple concerns that the TEB raised with respect to half of CPSS's samples, significant issues that were not identified for the awardee's samples. Contrary to CPSS's allegations, our review of the record does not reveal an unequal evaluation.

<sup>13</sup> CPSS reports that its proposed subcontractor is the incumbent contractor that has been providing the CMOP with the required supplies since 2008. Protest at 5.

prejudiced by the VA's decision not to complete the second part of its technical evaluation, which merely involved verifying that the quoted products' GSA descriptions were consistent with the RFQ's specifications. In this regard, competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate prejudice, our Office will not sustain the protest. Guidline Instruments, Inc., B-409924.2, Jan. 13, 2015, 2015 CPD ¶ 36 at 5. Given the significant concerns that the agency had with respect to half of CPSS's samples, in our view the protester has failed to demonstrate that its quotation would have warranted a higher rating had the agency simply confirmed that the rest of the vendor's quoted items met the RFQ's product specifications.<sup>14</sup> In sum, we find reasonable the agency's evaluation of CPSS's quotation under the technical conformance factor.

CPSS's next ground of protest focuses on the agency's decision to remove the utility knife and replacement blades from its requirements. The protester argues that the agency should have deemed M-Pak's quotation unacceptable because the vendor was unable to provide the two items. Additionally, CPSS asserts that the VA treated the vendors unequally when it simply removed the two items from the agency's requirements (after M-Pak was unable to provide them), but stood by its findings with respect to CPSS's samples.<sup>15</sup>

As noted above, the record reflects that prior to the establishment of the BPA (and after M-Pak's quotation was deemed the best value), M-Pak had not been able to add the utility knife and replacement blades to its FSS contract. AR, exh. 12, Email Exchanges with M-Pak Regarding Knife, at 1. The VA reports that the items were "not crucial" to the BPA and it was "not a matter of significant consequence" if the

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<sup>14</sup> For its part, the agency maintains that verifying the specifications of CPSS's other products would have been a "waste of time" because the "yes/no review" had no ability to raise the vendor's rating. Supp. AR at 4.

<sup>15</sup> The VA argues that CPSS is not an interested party to raise these challenges because the fair rating assigned to CPSS's technical quotation--which we find reasonable--precluded the vendor from being eligible for the BPA. AR at 4. We disagree. In this respect, we have found a firm to be an interested party where a firm protested that it was denied equal treatment because the agency rejected its nonconforming proposal while accepting a competitor's similarly nonconforming offer. E.g., Armed Forces Merch. Outlet, Inc., B-294281, Oct. 12, 2004, 2004 CPD ¶ 218 at 5. In other words, we view a protester as an interested party where the basis for protest is that the protester and the awardee were treated disparately, even where we agree that the protester's offer or quotation was unacceptable. See Aquila Fitness Consulting Sys., Ltd., B-286488, Jan. 17, 2001, 2001 CPD ¶ 4 at 4.

utility knife and replacement blades were not included on the BPA.<sup>16</sup> CO Statement at 3, 4. So, the agency decided to remove the items from its requirements to “move forward” with the BPA. Id. at 4. We agree with the protester that the agency, in essence, waived the requirement that vendors provide these two items.<sup>17</sup>

Here, however, the agency’s actions do not provide a basis to sustain the protest. In this respect, even where an agency clearly should have amended a solicitation or otherwise apprised vendors that it had effectively waived a requirement, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions. Zodiak of North America, B-409084 at al., Jan. 17, 2014, 2014 CPD ¶ 79 at 6; Labatt Food Serv., Inc., B-310939.6, Aug. 18, 2008, 2008 CPD ¶ 162 at 3. Competitive prejudice from such a waiver exists only where the requirement was not similarly waived for the protester, or where the protester would be able to alter its quotation to its competitive advantage if given the opportunity to respond to the relaxed term. See Zodiak of North America, supra; Phoebe Putney Memorial Hospital, B-311385, June 19, 2008, 2008 CPD ¶ 128 at 4.

In addition, there is no basis for finding, and the protester has not argued, that had CPSS known that the agency ultimately would not require the knife or replacement

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<sup>16</sup> The utility knife and replacement blades reflected less than 1 percent of the estimated value of the BPA. Supp. AR at 12. The VA reports that it will fulfill its needs for these items through “routine, competed purchase orders.” CO Statement at 3.

<sup>17</sup> Contrary to the protester’s assertion otherwise, the record reflects that M-Pak quoted a price for the knife and blades, thus complying with the RFQ requirement to submit a price for all items. See AR, exh. 27, M-Pak Pricing Schedule at 1-4; RFQ at 32. In addition, because the RFQ did not expressly require that all items be on a vendor’s FSS contract by the RFQ’s closing time, we find nothing improper with the agency permitting vendors to add quoted items to their respective schedule contracts after the submission of quotations and prior to the establishment of the BPA. In this regard, we previously have recognized that when an agency conducts a procurement under the FSS program, all items ordered must be on the vendor’s FSS contract at the time the order is issued. E.g., AmeriGuard Sec. Servs., Inc., B-411513.2, Oct. 2, 2015, 2015 CPD ¶ 308 at 4; cf. Science Applications Int’l Corp., B-401773, Nov. 10, 2009, 2009 CPD ¶ 229 at 2 (sustaining protest where all solicited items were not on awardee’s schedule contract at the time the purchase order was issued). Here, because the agency removed the utility knife and replacement blades--as well as the fill-air inflatable packaging film--prior to the establishment of the BPA, the record does not demonstrate a violation of this principle. Simply put, all required products were on M-Pak’s schedule contracts at the time the BPA was established.

blades, it would have changed its quotation to improve its competitive position. In this regard, the record reflects that evaluation of CPSS's bubble and poly mailers were what resulted in the vendor's fair technical conformance rating and precluded CPSS from being eligible for award, not the utility knife or replacement blades that it quoted.<sup>18</sup> Thus, the protester has failed to demonstrate that it suffered prejudice from the agency's decision to waive the requirement to supply the knife and blades.

Moreover, to the extent that the protester's disparate treatment argument hinges on the agency's decision not to similarly waive the requirement that vendors provide conforming bubble or poly mailers--the CPSS items rated unfavorably--such argument is flawed. In this regard, that the agency waived the requirement for the utility knife and blades imparted no obligation on the agency to waive any other items that other vendors had trouble providing.<sup>19</sup> Rather, on this record, equal treatment only required the VA to waive the knife and blade requirements for all vendors. However, given that CPSS's fair technical conformance rating was based on the evaluation of the vendor's bubble and poly mailer samples, whether the agency waived the requirements for the utility knife and replacement blade for CPSS had no effect on the protester's rating and ineligibility for award. Consequently, the protesters objection to the agency's decision to waive the requirements for the utility knife and replacement blades fails to provide a basis to sustain the protest.

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>18</sup> CPSS represents that its utility knife and replacement blades met the RFQ requirements and were TAA compliant. Regardless, such a determination has no bearing on the agency's actions here.

<sup>19</sup> In addition, the record does not reflect that the bubble or poly mailers were equally inconsequential as the utility knife and replacement blades such that it was inconsistent for the agency not to waive the issues the VA had with CPSS's mailers. On the contrary, the agency reports that the three mailers that were rated unfavorably for CPSS accounted for 19 percent of the BPA price, and the evaluation of the mailers was the "backbone of this procurement." Supp. AR at 12. Further, the agency explains that "[h]aving the prescription packaging items continually available through both scheduled and unscheduled delivery on a BPA was a matter of consequence due to [the agency's] limited storage space and high volume of mail-out prescriptions that required packaging." CO Statement at 3.